STATE OF MICHIGAN

COURT OF APPEALS

ROBERT STASIAK, Plaintiff-Appellant,	UNPUBLISHED May 11, 2006
v	No. 259223 Oakland Circuit Court
IVANHOE HUNTLEY TC BUILDERS, L.L.C., Defendant-Appellee.	LC No. 2003-054400-NO

Before: Schuette, P.J. and Bandstra and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition in this slip and fall case. We affirm.

Defendant was the builder of a condominium complex in Commerce Township, Michigan where plaintiff's son and daughter-in-law purchased a newly constructed condominium unit on July 19, 2002. On September 9, 2002, plaintiff visited his son and daughter-in-law at their condominium.[1] During the course of this visit, plaintiff walked out through the garage of the unit with intent to enter into the side yard to access the electric meter.[2] The landscaping around plaintiff's son's condominium had not yet been installed, and plaintiff alleges he slipped and fell after taking one and a half steps outside of the garage on what he has described as "loose rocks" or "debris," and in an area where the grade was apparently steep.

Plaintiff filed suit against defendant, alleging that defendant had a duty to "make and keep the premises [where he fell] reasonably safe for his use." Defendant first filed a notice alleging that the Treyborne Cove Homeowner's Association was a non-party at fault because it was in possession and control of the area where plaintiff fell. Defendant next filed a motion for summary disposition under MCR 2.116(C)(10) on the ground that the danger was open and

[1] Plaintiff stated he had visited them on at least ten occasions before September 9, 2002

[2] Plaintiff's son had asked him to help determine if there was a problem with his DTE Energy bill; plaintiff had contacted DTE and determined there was likely some sort of problem, and so intended to check the meter for additional information.

obvious. Plaintiff's brief in opposition to the motion argued that defendant could not claim the open and obvious defense because it is limited to claims against property owners and possessors. Defendant's reply brief disputed that argument, and argued that in the alternative, defendant owed no duty to plaintiff. Plaintiff had claimed a duty arose from the contract for purchase of the condominium, and defendant countered that defendant was neither a party nor an intended beneficiary of that contract.

The trial court granted defendant's motion for summary disposition on two grounds. First, the court found that since plaintiff was neither a party nor a third-party beneficiary of the contract, "to the extent that Plaintiff claims the duty arose out of the Purchase Agreement" between plaintiff's son and defendant, plaintiff could not rely on the contract. Second, "to the extent that the Complaint is based on premises liability," because defendant was not in possession of the premises, no duty was owed to plaintiff.

On appeal, plaintiff argues that the danger was not open and obvious, that even if it was, defendant is not entitled to that defense because defendant is not the owner or possessor of the premises, and that the trial court erred in dismissing the negligence action on the ground that plaintiff was not a party to the contract between defendant and the purchasers of the condominium. We review the trial court's grant of summary disposition de novo. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004). A 2.116(C)(10) motion should be granted only if there is no genuine issue of material fact after we have considered the pleadings, affidavits, depositions, admissions, and other documentary evidence in a light most favorable to the nonmoving party, and the moving party is entitled to judgment as a matter of law. *Steward v Panek*, 251 Mich App 546, 555; 652 NW2d 232 (2002).

It is undisputed here that at the time of the fall the landscaping had not yet been installed around plaintiff's son's condominium. Photographs of the side of the house indicate that at the time of the fall there were miscellaneous small stones and rocks, pieces of gravel, and twigs on the side of the building, and a piece of concrete debris was also present. It is also undisputed that defendant had a contractual responsibility for completing the landscaping, but that the condominium homeowner's association owned and possessed the land around the condominium.

Kristin Scot Brueck, defendant's Construction Project Manager, stated in his deposition that completed landscaping was not a necessary condition prior to purchase or to receipt of a Certificate of Occupancy allowing a new owner to move in. He stated that all purchasers were informed in pre-construction meetings prior to purchase that the landscaping around their individual condominium unit would be completed on a schedule that maximized cost effectiveness for the landscaping of the complex as a whole, so owners knew when they purchased or moved in that the landscaping might not be completed for some time. Defendant handled the grading around each unit, but subcontracted the landscaping and the cleanup around the construction sites to Great Oaks Landscape Associates. Great Oaks did not complete the cleanup on a site until the point in the process when it would begin laying sod.

Plaintiff's complaint alleged negligence but did not identify the theory of liability under which he was seeking relief. The complaint included components of both a premises liability action claim and a general negligence action. Plaintiff alleged that defendant breached the general duty of making and keeping the premises reasonably safe because it failed to warn of the defect, failed to keep the area at issue free and clear of hazards, maintained the dangerous area,

and failed to repair or remove the dangers, all allegations that sound in premises liability. See *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497; 595 NW2d 152 (1999). Plaintiff also alleged that defendant breached its duty by failing to grade and landscape the property, a negligence claim based on contractual duties in the purchase agreement.

Defendant argued in its motion for summary disposition that the "open and obvious" doctrine shielded it from liability. Plaintiff argued that because defendant is not the owner or possessor of the premises, the doctrine cannot be used as a defense. The trial court did not address this issue, finding without addressing defenses that plaintiff's claim could not succeed as a matter of law on either a premises liability or a general negligence theory. We agree with the trial court and similarly see no need to address the open and obvious doctrine in this context.

Plaintiff's premises liability claim clearly fails on the facts before us: "In a premises liability claim, liability emanates merely from the defendant's duty as an owner, possessor, or occupier of land." *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005). In this case, a premises liability action may not be maintained against defendant because defendant was not the owner, possessor, or occupier of the land around plaintiff's son's condominium unit. There is no dispute that the land was a common area owned by the condominium association. The trial court properly determined that the premises liability aspect of plaintiff's claim failed.

Plaintiff's general negligence count against defendant likewise fails because plaintiff is unable to prove the threshold elements: duty, breach of duty, causation, and damages. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). Plaintiff is attempting to hold defendant liable for allegedly negligent performance of, or failure to perform, a contractual duty to landscape and finish the grading of the property where plaintiff fell. But plaintiff was not a party to that contract; the contract was between defendant and plaintiff's son and daughter-in-law. And a nonparty to a contract cannot assert a tort claim based on performance of contractual obligations unless the nonparty was owed a duty "separate and distinct" from the defendant's contractual obligations. *Fultz, supra* at 467.

In the pleadings, plaintiff failed to establish a duty owed to him, separate and distinct from the contractual duties of landscaping and finishing the grading owed by defendant to plaintiff's son and daughter-in-law. On appeal, plaintiff has not attempted to establish the existence of a separate and distinct duty. Rather, he relies solely on *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703; 532 NW2d 186 (1995), overruled in part on other grounds in *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999), to argue that "[t]hose foreseeably injured by the negligent performance of a contractual undertaking are owed a duty of care." The Court in *Osman* reached this conclusion based on the reasoning of the Supreme Court in *Clark v Dalman*, 379 Mich 251, 260-261; 150 NW2d 755 (1967), which opinion clarified that "it must be kept in mind that the contract creates only the relation out of which arises the common-law duty to exercise ordinary care."

But in *Fultz, supra* at 467-468, the Court distinguished *Osman* and clarified that "the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie." See also *Teufel v Watkins*, 267 Mich App 425, 430; 705 NW2d 164 (2005). We need not address the question of whether it is foreseeable that a person will step without looking in an area they know to be steeply graded and covered in loose rocks, because in

this case, plaintiff claims that the duty owed to him was attendant to the contract and was a common-law duty to perform with ordinary care.

The trial court properly granted summary disposition on plaintiff's claim against defendant.

Affirmed.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper